BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICIA A. BELL	)	
Claimant	)	
	)	
VS.	)	
	)	
BOEING COMPANY	)	
Respondent	)	Docket No. 239,082
	)	
AND	)	
	)	
AMERICAN MFRS. MUTUAL INS.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of Administrative Law Judge John D. Clark's October 14, 2002, Award of Review and Modification. The Board heard oral argument on March 21, 2003.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared for the claimant. Frederick L. Haag of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This is a review from an award entered on review and modification. The Administrative Law Judge (ALJ) determined claimant had proven a 36 percent work disability but concluded that claimant was not entitled to any additional weeks of compensation. The ALJ calculated the number of weeks payable for a 36 percent work disability and then deducted the weeks claimant had been paid under the Agreed Award. The ALJ then noted that claimant had returned to accommodated work for respondent and

concluded that when those weeks working at a comparable wage were deducted the claimant would not have any additional disability weeks payable.

Claimant argues the ALJ should have only subtracted the previously paid disability weeks in the calculation of the number of disability weeks payable. Because claimant was not being paid any disability compensation while working, she argues those weeks cannot be deducted from the total disability weeks payable. And claimant argues the current work disability should be based upon a 100 percent wage loss and a 54 percent task loss.

Respondent argues that claimant cannot again litigate the work disability percentage that the parties agreed to in the original award. And respondent argues that in addition to the weeks when compensation was paid, it is also entitled to deduct the number of weeks claimant worked at the accommodated job from the number of disability weeks payable for the 36 percent work disability even though no disability compensation was paid or payable for those weeks. Consequently, respondent concludes claimant is not entitled to any additional disability compensation and the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant suffered an injury on September 24, 1998, to her bilateral wrists and back. The claimant was off work from the date of her accident and she litigated her claim based upon a work disability. On October 14, 1999, the claimant returned to work for the respondent. After she returned to work, the parties agreed to an Award which provided claimant had suffered an 11 percent functional impairment and a 36 percent work disability.

The claimant received 55 weeks of permanent partial disability compensation as a result of the agreed Award. This represented the number of weeks from the date of accident until claimant returned to work. Claimant continued working for respondent until December 14, 2001, when she was medically laid off because her restrictions could no longer be accommodated.

On January 15, 2002, claimant filed an Application for Review and Modification of the agreed Award. At the review and modification hearing claimant argued that because claimant was laid off she now has a 100 percent wage loss and consequently her work disability has changed.

Claimant testified that since she was laid off she has engaged in a job search which at a minimum meets the requirements to draw unemployment benefits. But she has not obtained employment. Before the parties entered the agreed Award, the deposition of James T. Molski, a vocational rehabilitation consultant, was taken to establish claimant’s

task list for the 15 years preceding the date of accident. Mr. Molski was again deposed for the review and modification proceeding and opined that claimant's task list was unchanged from his prior interview with claimant. No further evidence regarding task loss was presented.

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. The Workers Compensation Act provides, in part:

> Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.[1]

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.[2] If there is a change in the claimant's work disability, then the award is subject to review and modification.[3]

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.[4] Our appellate courts have consistently held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.[5]

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[1] K.S.A. 44-528.

[2] See *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

[3] See *Garrison v. Beech Aircraft Corp.*, 23 Kan App. 2d 221, 225, 929 P.2d 788 (1996).

[4] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan App. 2d 527, 531, 598 P.2d 544 (1979).

[5] See, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

The review and modification statute effective on claimant's September 24, 1998, accident date provided that an award may be modified if the functional impairment or work disability of the injured worker has increased or diminished.[6] Review and modification of an award is appropriate where there has been a change in the claimant's condition.[7] The change does not have to be a change in claimant's physical condition. It could be an economic change, such as a claimant returning to work at a comparable wage,[8] or losing a job because of a layoff.[9] The burden of establishing the changed conditions is on the party asserting them.[10]

When claimant returned to work at a comparable wage on October 14, 1999, she was not eligible for any work disability payments. Furthermore, the total number of weeks of permanent partial disability based on her percentage of functional impairment had been paid. But when she was laid off on December 14, 2001, she alleged her work disability changed. The fact that she had previously agreed to an award based upon a 36 percent work disability does not prevent claimant from attempting to prove her work disability has changed. She is not again litigating the original award as claimed by respondent, instead she is attempting to establish that because there was a changed condition, i.e. in her employment status, her work disability was again payable. There was nothing in the agreed award to indicate it was a full and final settlement of her claim or that the right to future review and modification was waived. Actually, the agreed award was sufficient to cover this eventuality, because the parties had already agreed to both claimant's percentage of functional impairment and work disability. But because of the disagreement concerning how an award is calculated, those benefits were not reinstated as the agreement provided.

The claimant also disputed that she is bound by the 36 percent work disability agreement. The ALJ noted the agreed award was a compromise and there was no indication regarding the percentage of either task or wage loss used in arriving at the 36 percent work disability. The ALJ concluded he could not determine if claimant's task loss had increased and consequently he limited the work disability to the previously agreed 36 percent. The Board agrees and affirms the ALJ's determination that claimant is entitled to a 36 percent work disability because she failed to meet her burden of proof to establish that her work disability changed from the original 36 percent.

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[6] *See* K.S.A. 44-528 (1993 Furse).

[7] See *Gile v. Associated Co.*, 223 Kan. 739, 740, 576 P.2d 663 (1978).

[8] See *Ruddick v. Boeing Co.*, 263 Kan. 494, 949 P.2d 1132 (1997).

[9] See *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 372, 899 P.2d 516 (1995).

[10] See *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

The claimant argues the ALJ erred in deducting the number of weeks claimant was performing accommodated work from the total number of disability weeks determined for her work disability. The Board agrees.

As demonstrated by this case, there can be periods of time when the claimant's disability percentage changes. The reform legislation enacted in 1993 changed the method used to calculate the weekly benefit payable but did not address how to calculate benefits payable for an injury when the disability rate changes for one injury.

Such a change may occur from review and modification or as a part of the initial award when, for example, the claimant ceases to work or returns to work after being off for a period. The award may change from functional to work disability or vice versa. The wage prong of the work disability test and consequently the percentage of work disability may change. Under the pre-1993 calculation, a change in the disability rate meant a change in the weekly rate for the remaining weeks. The calculation used for an injury after July 1, 1993, does not lend itself so easily to a change.

There are several possible methods for calculating the award when there is a change in the disability rate. After considering the various options, the Board concluded the most equitable method is to calculate the award, or recalculate the award if benefits have already been paid based on a different disability rating, using the new or latest disability rate as though no permanent partial benefits had been paid or were payable under any earlier disability rate. The award so calculated gives the total number of weeks and amounts payable for the award. If permanent partial benefits have previously been paid, based on a different rate of disability, respondent is entitled to a credit for those payments. If the rating goes down, as when the claimant returns to work after being off for a period of time, and the new calculation on the new rating results in fewer weeks than respondent has previously paid, respondent owes nothing more. If the disability rate goes up, as when the claimant is laid off, the new work disability rating is calculated based on 415 weeks (less deduction for temporary total paid over 15 weeks) and the number of weeks of permanent partial benefits paid based on the lower rating is credited against amounts due. The last disability rating or amounts already paid or payable, if higher, become the ceiling on benefits awarded. This method of computation was affirmed by the Kansas Court of Appeals in *Wheeler v. Boeing Co.*, 25 Kan. App. 2d 632, 967 P.2d 1085 (1998), *rev. denied* 266 Kan. 1116 (1999).

Utilizing the percentages agreed to by the parties, during the time period since her injury the claimant's work disability has changed three times. From the date of accident until claimant returned to work for respondent on October 14, 1999, claimant had a 36 percent work disability. When claimant returned to work at a comparable wage she had an 11 percent functional disability. After she was laid off on December 14, 2001, claimant again has a 36 percent work disability.

Simply stated, after every change in the percentage of disability, a new calculation is required to determine if there are additional disability weeks payable. If so, the claimant is entitled to payment of those additional disability weeks until fully paid or modified by a later change in the percentage of disability. This calculation method requires that for each change in the percentage of disability, the award is calculated as if the new percentage was the original award, thereafter the number of disability weeks is reduced by the prior permanent partial disability weeks already paid or due.

Initially a payment rate must be determined, which in this case is calculated by multiplying the $1,051.01 average gross weekly wage by .6667.[11] Such calculation computes to an amount greater than the maximum provided by K.S.A. 44-510c and therefore results in the maximum payment rate of $366.

The next step is to determine the number of disability weeks payable by subtracting from 415 weeks the total number of weeks temporary total disability compensation was paid, except that the first 15 weeks of temporary total disability compensation is excluded. The remainder is then multiplied by the percentage of permanent partial general disability.[12]

Starting with the claimant's initial award based upon a 36 percent work disability the calculation would require 415 weeks to be multiplied by the 36 percent permanent partial disability.[13] Such calculation results in 149.4 disability weeks payable.

The same calculation is made for each subsequent change in the claimant's disability with the additional step of deducting the weeks of previously paid permanent partial disability from the total disability weeks payable as determined by each new calculation.

When claimant returned to work at a comparable wage for respondent on October 14, 1999, her disability decreased to her 11 percent functional impairment.[14] Accordingly, a new calculation requiring 415 weeks to be multiplied by the 11 percent permanent partial disability was necessary. Such calculation results in 45.65 disability weeks payable for the 11 percent functional disability. But claimant had already been paid for 55 disability weeks. Because claimant had already been paid for more permanent partial disability weeks than that new sum, the claimant was not entitled to additional compensation from that date forward unless her circumstances again changed such that

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[11] K.S.A. 1998 Supp. 44-510e(a)(1).

[12] K.S.A. 1998 Supp. 44-510e(a)(2).

[13] There are no weeks of temporary total disability compensation to deduct.

[14] See K.S.A. 1998 Supp. 44-510e(a).

her percentage of disability was again modified to provide additional weeks of disability compensation.

When claimant was laid off on December 14, 2001, her disability changed. In this case, the new calculation requires 415 weeks to be multiplied by the 36 percent permanent partial disability. Such calculation results in 149.4 disability weeks payable. From those weeks only the previously **paid** 55 disability weeks are deducted which results in a sum of 94.4 additional disability weeks payable.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated October 14, 2002, is modified to award claimant an additional 94.4 weeks of permanent partial disability compensation.

The claimant is entitled to 94.4 weeks permanent partial disability compensation at the rate of $366 per week or $34,550.40 for a 36 percent work disability.

As of March 28, 2003, there would be due and owing to the claimant an additional 67 weeks of permanent partial compensation at $366 per week in the sum of $24,522 which is due, owing and ordered paid in one lump sum. Thereafter, the remaining balance in the amount of $10,028.40 shall be paid at $366 per week for 27.4 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of March 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Frederick L. Haag, Attorney for Respondent
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation